IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.3.2005

CORAM:

THE HONOURABLE MR.JUSTICE N.KANNADASAN

CIVIL REVISION PETITION Nos.1818 and 1206 OF 2004
and
C.M.P.No.9573 OF 2004

Kasipalayam Town Panchayat,
rep. by its Executive Officer,
Kasipalayam, Edore. .. Petitioner/petitioner in both the petitions

Vs.

1. Arumugam
2. Kamala
3. Mohan
4. Erode Municipality,
rep. by its Commissioner,
Erode. .. Respondents/Respondents - do -

Civil Revision Petitions under Section 115 of C.P.C., against the the common fair and decretal order dated 30.1.2004 respectively made in I.A.Nos.660 and 661 of 2004 in C.F.R.No.14330 of 2001 on the file of the Principal District Judge, Erode.

For Petitioner: .. Mr.D.Krishnakumar
For Respondents: .. Mr.S.Kaithamalai Kumaran for R1 to R3.
No appearance for R4.

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O R D E R

Both the above Civil Revision Petitions are filed challenging the common fair and decretal order dated 30.1.2004 passed in I.A.Nos.660 and 661 of 2004 in C.F.R.No.14330 of 2001 by the Principal District Judge, Erode.

2. The petitioner has filed two applications seeking to condone the delay of 355 days and 358 days in representing the appeal memorandum.

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3. The respondents have filed the suit in O.S.No.480 of 1994 as early as in the year 1994 claiming damages as against the defendants. The petitioner herein is also one of the defendants. The trial Court decreed the suit to the effect that the petitioner as well as the fourth respondent herein shall equally liable to pay damages to the plaintiffs. Subsequently, the petitioner seems to have preferred appeal with deficiency of court fee, which was returned for compliance. In the meanwhile when the plaintiffs/respondents filed Execution Petition in E.P.No.120 of 2003. The petitioner has represented the appeal memorandum along with the applications for condoning the delay of 355 days and 358 days in representing the appeal memorandum. The said applications were dismissed. Against which these revision petitions.

4. The learned counsel for the petitioner would contend that the trial Court ought not to have dismissed the applications, since the said applications are only seeking condonation of delay to represent the appeal memorandum. The learned counsel would add that some reasonable costs may be imposed and the petitioner's right for pursuing the appeal should not be taken away. In this connection learned counsel for the petitioner would rely on the decisions reported in 1993 TLNJ 375 (Y.Cusbar v. K.Subbarayan), 1978 TLNJ 332 (The General Manager, Heavy Vehicles Factory, Avadi and another v. T.Shadrak) and 2004 CTC 161(The Shipping Corporation of India Ltd., v. Union of India).

5. Per contra, the learned counsel for the respondents 1 to 3 would contend that the petitioner has not even chosen to assign proper reasons for condoning the delay and there is no bona fide on the part of the petitioner. Inasmuch as the appeal was presented with deficiency of Court Fee and the suit having been filed in the year 1994 claiming damages, and the decree being obtained in the year 2000, the plaintiffs are not in a position to see the colour of the coin till date. In the light of the said circumstances, he opposed to grant the relief sought for by the petitioner herein.

6. I have considered the rival contentions of the learned counsel for both side. Admittedly, in the affidavit filed in support of the applications seeking condonation of delay, the reasons given therein are vague and casual in nature. Even though there is an enormous delay of 355 days and 358 days in representing the appeal memorandum, the reasons assigned by the petitioner in both the applications are identical to each other. The very fact that the petitioner preferred appeal with deficiency of court fee would suggest that the subsequent action in pursuing the appeal is only to prolong the appeal to some more time to avoid execution proceedings. The decision relied on by

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the learned counsel for the petitioner viz., 1993 TLNJ 375 is rendered considering the fact that certain calamity took place in the family of the Advocate's clerk, who has sworn into the affidavit and there was no specific denial of the claims made therein and accordingly the delay therein was condoned.

7. Similarly, as regards the decision rendered by the learned Judge reported in 1978 TLNJ 332 is concerned, the same is rendered to the effect that notice is not necessary when a petition to condone the delay in representation is filed. Admittedly, the case on hand do not fall in the said category.

8. Similarly, the decision reported in 2004 CTC 161 proceeds to the effect that the Courts need not be strict in condoning the delay in representation. However, in the very same decision the word of 'caution' is there to the effect that 'the courts should be cautious and examine the conduct of the parties.' Hence, the above decision is not also applicable to the case on hand.

9. In the instant case, the learned trial Judge has exercised his judicial discretion by considering the entire materials placed on record. It is needless to state that the discretion to be exercised should be of judicial discretion. The Black's Law Dictionary, Seventh Edition, by Bryan A.Garner would define "Judicial Discretion" as,

> "The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."
>
> The vesting of discretion is the unspoken, but inescapable, silent command of our judicial system and according to Lord Mansfield (Tingley v. Dolby, 14 NW 146),
>
> "discretion, when applied to a Court of justice means sound discretion connected by law. It must be governed by rule, not by humour; it must not be arbitrary and vague, but legal and regular."
>
> (a) In a ruling reported in AIR 1978 SC 429 (G.Narasimhulu v. Public Prosecutor), the Supreme Court ruled,
>
> "An appeal to a judge's discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with, established principles of law."
>
> (b) In AIR 1995 SC 1945 = 1996-1-L.W.29 (Buta Singh v. Union of India), a case arising under Section 149 C.P.C., the Supreme Court while pointing out the scope of Section 149, ruled thus,

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> "Therefore, the Court is required to exercise its judicial discretion keeping the facts and circumstances in each case and not automatically for mere asking that indulgence be shown to the party to make good the deficit Court fee. In the latter event, it is not the exercise of the judicial discretion but showing undue indulgence."

10. In the light of the above settled principles, while exercising the discretion, the Courts should exercise the same by following the principles of judicial discretion. Admittedly, the trial Judge has exercised the judicial discretion in accordance with law.

11. In the light of the above facts and circumstances, I do not see any error apparent on the face of the order of the trial Judge so as to warrant this Court to interfere with the said order.

12. In the result, both the Civil Revisions do not merit acceptance and are dismissed. The common fair and decretal order dated 30.1.2004 respectively made in I.A.Nos.660 and 661 of 2004 in C.F.R.No.14330 of 2001 on the file of the Principal District Judge, Erode is confirmed. No costs. Consequently, connected C.M.P. is also dismissed.

gr.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. THE PRINCIPAL DISTRICT JUDGE
ERODE

2. THE RECORD KEEPER
VR SECTION, HIGH COURT,
MADRAS

+ ONE CC TO MR.A.K. KUMARASAMY, FOR M.S. KAITHAMALAI KUMARAN
IN SR 13394

+ TWO CCS TO MR. D. KRISHNAKUMAR, ADVOCATE IN SR 13173, 13174

C.R. P.NPD Nos.1818 and 1206 of 2004

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